Anwar et al v. Fairfield Greenwich Limited et al Doc. 195

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: 09-CV-2366 (VM) (*Ferber* Action) 09-CV-2588 (VM) (*Pierce* Action) 09-CV-5012 (VM) (*Morning Mist* Action) 09-CV-5650 (VM) (*Sentry* Action)	MASTER FILE NO. 09-CV-0118 (VM)

DEFENDANT FGA'S OPPOSITION TO THE MOTIONS TO REMAND BY THE FERBER, PIERCE, MORNING MIST AND SENTRY PLAINTIFFS

July 27, 2009

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PRELIMINARY STATEMENT

Defendants' position is straightforward and required by the language and intent of the Class Action Fairness Act ("CAFA"). Claims brought by or for the benefit of hundreds of investors in funds associated with the Fairfield Greenwich Group to recover losses arising from the Madoff Ponzi scheme are "mass actions" under CAFA and therefore were properly removed to this Court. The question is one of first impression. There are no controlling cases addressing whether an action pled derivatively for the benefit of investors in a non-operating hedge fund, or brought by that fund itself for the benefit of those same investors, constitutes a "mass action" under CAFA. However, as set forth below, the plain text of CAFA and important public policy issues that led to its passage make clear that these cases, *Pierce*, *Ferber*, *Morning Mist*, and *Sentry* (the "Actions") are removable and should proceed in federal court.[1]

CAFA was broadly drafted to cover both actions (i) expressly pled as large "class actions", and, importantly, (ii) other actions on behalf of a large number of potential beneficiaries – denominated "mass actions" in the statute – where a plaintiff seeks relief for the benefit of investors through a mechanism other than a "class action." In enacting CAFA, Congress sought to prevent situations in which an action is "likely to become an 'orphan' that cannot be coordinated with similar class actions that are or, in the future, may be pending in federal court." S. Rep. No. 109-14, at 39 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 37.

The cases at issue here are precisely such actions. The Actions involve hundreds of millions of dollars and are brought for the benefit of investors throughout the country and, indeed, the world. They are precisely the sort of "interstate cases of national importance" that

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1 The *Pierce*, *Ferber* and *Morning Mist* Actions are brought by Derivative Plaintiffs, all represented by Milberg LLP. The *Sentry* Action is brought by Fairfield Sentry Limited (the "Fund") (with Derivative Plaintiffs, "Moving Plaintiffs"). *See* Exhibit A.

Congress intended to be heard in federal court when it passed CAFA. *Puglisi v. Citigroup Alternative Inv., LLC,* No. 08 CV 09774, 2009 WL 1515071, at *3 (S.D.N.Y. May 27, 2009) (citing 28 U.S.C. § 1711(b)(2)).

In its removal notices, Fairfield Greenwich Advisors LLC ("FGA") established the threshold requirements of CAFA: *i.e.*, that: (a) at least one member of the putative class is a citizen of a state different from at least one defendant or at least one member of the putative class is a citizen or subject of a foreign state and any defendant is a citizen of a U.S. state; (b) each action consists of at least 100 persons whose monetary relief claims are proposed to be tried jointly on the ground that the claims involve common questions of law or fact; and (c) the amount in controversy exceeds $5 million. *See* 28 U.S.C. §§ 1332(d), 1453. Plaintiffs cannot prove, as they must, that these requirements are not met, nor can they prevail on their other remand arguments.

The relief sought is not only unwarranted but also contradictory. In a July 21, 2009 telephone conference held by Magistrate Judge Katz with the parties in the consolidated *Anwar* action, counsel for Derivative Plaintiffs argued that the derivative claims should be heard only in state court, but simultaneously asked this Court to allow them to litigate in federal court any derivative claims that may be brought in a Second Consolidated Amended Complaint.

Derivative Plaintiffs' conflicting stance underscores the complexities and challenges of this litigation. Currently three different sets of plaintiffs (the Shareholder Class Plaintiffs, the Derivative Plaintiffs, and the Fund Plaintiff) representing the same large group of potential beneficiaries are vying to recover the same assets as compensation for the same alleged losses under various legal theories. Further complicating matters, the Trustee for Bernard L. Madoff Investment Securities, Inc. ("BLMIS") is likely to take the position here that any judgment or settlement paid is property of the Madoff estate. The overlapping and duplicative nature of the relief being sought is even clearer given that the Fairfield Greenwich funds at issue are no longer actively functioning or taking new investors and, as was discussed during the July 21 teleconference, a liquidator for the largest Fund has been appointed.

The relief sought by Moving Plaintiffs is not only unwarranted under CAFA but would undermine the coherent and orderly structure the Court has established to litigate the claims asserted against the Fairfield Greenwich Defendants arising out of the Madoff fraud. The remand motions should be denied.

BACKGROUND

On December 19, 2008, the first complaint in this consolidated action (*Anwar*) was filed in New York state court against certain of the Fairfield Greenwich Defendants and subsequently removed to this Court. A second action (*Pacific West*) was filed in this Court on January 8, 2009 and consolidated into *Anwar* on January 14, 2009. A third action (*Inter-American Trust*) was consolidated into *Anwar* on January 23, 2009.

On January 30, 2009, the Court entered the Consolidation Order and Order for Appointment of Co-Lead Counsel (the "Consolidation Order") and appointed as Interim Co-Lead Counsel the firms representing the *Anwar*, *Pacific West*, and *Inter-American Trust* plaintiffs.

Subsequent to entry of the Consolidation Order, Moving Plaintiffs in *Pierce*, *Ferber*, *Morning Mist* and *Sentry* filed their complaints in the Supreme Court for the State of New York. FGA timely removed each of those Actions to this Court. Pursuant to the Consolidation Order, and the Court's March 11, 2009 Civil Case Management Plan and Scheduling Order (the "CMO"), the Court consolidated each of the actions into *Anwar*. *See* Exhibit A.

On April 24, 2009, Interim Co-Lead Counsel in *Anwar* filed a Consolidated Amended Complaint (the "CAC"). The CAC did not assert claims under the federal securities laws or derivative claims. On June 8, 2009, Interim Co-Lead Counsel and counsel for defendants in *Anwar* submitted a stipulation, which the Court subsequently so-ordered, pursuant to which defendants consented to the service and filing by plaintiffs of a Second Consolidated Amended Complaint and agreed that defendants' time to answer, move against or otherwise respond to any complaint in *Anwar* would be adjourned until 45 days after service by plaintiffs of a Second Consolidated Amended Complaint.

On May 11, 2009, counsel for three sets of plaintiffs, including Interim Co-Lead Counsel, filed applications for appointment as lead counsel and lead plaintiff for federal securities law claims pursuant to the Private Securities Litigation Reform Act ("PSLRA"). On July 7, 2009, the Court appointed the *Anwar* Plaintiffs, represented by Interim Co-Lead Counsel (Boies, Schiller and Flexner LLP, Wolf Popper LLP, and Lovell Stewart Halebian LLP), as lead PSLRA plaintiffs and Interim Co-Lead Counsel as PSLRA lead counsel.

To date, the Court has consolidated a total of eleven cases into *Anwar* (*see* Exhibit B), and a multidistrict litigation proceeding has been initiated to transfer a twelfth case, *Headway Investment Corp. v. American Express Bank Ltd. d/b/a Standard Chartered Private Bank*, No. 09-21395-CMA (S.D. Fl.), to the Southern District of New York for consolidation into *Anwar*. Moving Plaintiffs now move to remand the Actions to State court.[2]

2 Moving Plaintiffs also sought to vacate the Court's consolidation orders in the Actions, and counsel for Derivative Plaintiffs sought to be appointed Co-Lead Derivative Counsel. During the July 21, 2009 teleconference, Magistrate Judge Katz instructed the parties that only requests for remand would be briefed and addressed on the current briefing schedule. On July 22, 2009, Derivative Plaintiffs withdrew their motions to vacate consolidation of the Derivative Actions and to appoint Co-Lead Derivative Counsel.

ARGUMENT

I. THE ACTIONS SHOULD REMAIN IN FEDERAL COURT UNDER CAFA

CAFA extends federal diversity jurisdiction to actions that have minimal diversity, no fewer than 100 beneficial members of the plaintiff group, and at least $5,000,000 in controversy. It was drafted to encompass both actions expressly pled as large "class actions" and other actions with large numbers of potential beneficiaries denominated as "mass actions" – such as the Actions here – that like class actions potentially would benefit a large number of plaintiffs but have not been brought as class actions by plaintiffs.

In enacting CAFA, Congress noted that one of its purposes was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction[.]" 28 U.S.C. § 1711(b)(2). Congress emphasized its belief that "the federal courts are the most appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs and have significant implications for interstate commerce and national policy." S. Rep. No. 109-14, at 27 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 27. As such, CAFA corrected "a flaw in the current diversity jurisdiction statute" (*id.*) by creating another basis to remove "securities cases that have national impact" from state courts. *Estate of Pew* v. *Cardarelli*, 527 F.3d 25, 26 (2d Cir. 2008). CAFA's jurisdictional provisions "should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if removed by any defendant." *New Jersey Carpenters Vacation Fund v. HarborView Mortg. Loan Trust 2006-4*, 581 F. Supp. 2d 581, 585 (S.D.N.Y. 2008) (quoting 151 Cong. Rec. H732-01, H-730 (Feb. 17, 2005) (statement of Congressman Goodlatte)); *see also In re Textainer P'ship Sec.*

Litig., No. C 05-0969 (MMC), 2005 WL 1791559, at *3 (N.D. Cal. July 27, 2005) (quoting same statement).

Ferber, *Pierce*, *Morning Mist*, and *Sentry* are precisely the sort of "interstate cases of national importance" that Congress intended to be heard in federal court when it passed CAFA. *Puglisi*, 2009 WL 1515071, at *3 (citing 28 U.S.C. § 1711(b)(2)). They concern the impact of the Madoff fraud on a large nationwide (and, indeed, global) group of investors and involve hundreds of millions of dollars.

The Actions certainly resemble class actions for purposes of CAFA.[3] Derivative Plaintiffs purport to bring their Actions "in the name of and for the benefit of [the partnerships] and [their] Limited Partners..."[4] *See, e.g.*, *Ferber* Complaint ¶ 1; *Pierce* Complaint ¶ 2; *Morning Mist* Complaint ¶ 1. Similarly, *Sentry*, while brought by the Fund itself (which now is in liquidation), is essentially an action to recover losses on behalf of the shareholders of the Fund. The circumstance that these claims are not brought and labeled as "class action claims" is not dispositive of whether they can be removed to this Court pursuant to CAFA. Indeed, as

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3 The Senate Judiciary Committee's Report on CAFA ("Committee Report") confirms that the term "class action" should be defined broadly:

> [T]he Committee notes that as with the other elements of Section 1332(d), the overall intent of these provisions is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications. In that regard, the Committee further notes that *the definition of "class action" is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled "class actions" by the named plaintiff* or the state rulemaking authority. Generally speaking, lawsuits that resemble a purported class action should be considered class action for the purpose of applying these provisions.

S. Rep. No. 109-14, at 35 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 34 (emphasis added).

4 Counsel for Derivative Plaintiffs publicly have stated that they are "ditching the class action for derivative actions" because class actions "are absolutely going nowhere" and "are guaranteed to get dismissed" and because derivative actions are "the only type of lawsuit that's going to succeed and actually go someplace." AmLaw Daily, "Milberg's Brad Friedman: Madoff Concessions 'A Drop in the Ocean'," Mar. 4, 2009.

noted *supra*, Congress specifically enacted CAFA to prevent plaintiffs from circumventing federal subject matter jurisdiction through artful pleading. Removal of these Actions is encompassed within CAFA's language and purpose.

A. Moving Plaintiffs Cannot Meet Their Burden on Remand

FGA has established the threshold requirements of CAFA in each of the Actions: (a) at least one member of the putative class is a citizen of a state different from at least one defendant or at least one member of the putative class is a citizen or subject of a foreign state and any defendant is a citizen of a U.S. state; (b) each action consists of at least 100 persons whose monetary relief claims are proposed to be tried jointly on the ground that the claims involve common questions of law or fact; and (c) the amount in controversy exceeds $5 million. *See* 28 U.S.C. §§ 1332(d), 1453. No more is required.

Moving Plaintiffs concede that the diversity requirement and the $5 million amount in controversy requirement of CAFA are met in each of the Actions. They take issue only with the 100-person requirement. According to Derivative Plaintiffs, the 100-person requirement is not met in *Ferber*, *Pierce*, and *Morning Mist* because they are derivative actions each brought by only one or two named plaintiffs. Similarly, the Fund argues that the 100-person requirement is not met in *Sentry* because its claims are direct, even though those claims are brought by a non-operating Fund solely for the benefit of the Fund's over 700 shareholders.

Moving Plaintiffs also argue that specific exceptions to CAFA apply: (1) that the $75,000 jurisdictional requirement under 28 U.S.C. § 1332(a) is not met,[5] and (2) that the "internal affairs" doctrine applies. As demonstrated below, each of Moving Plaintiffs' arguments fails, and the Actions should remain in this Court.

[5] This argument is advanced only by Derivative Plaintiffs.

1. The Actions Are Mass Actions Under CAFA[6]

CAFA establishes federal jurisdiction over "mass actions" by providing that a "mass action shall be deemed a class action" and subject to CAFA's provisions if it otherwise satisfies the requirements of the statute outlined in 28 U.S.C. §§ 1332(d)(2)-(10). 28 U.S.C. § 1332(d)(11)(A).[7] CAFA describes a "mass action" as "any civil action…in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(d)(11)(B)(i).

(a) The Derivative Actions Are Mass Actions Under CAFA

The crux of Derivative Plaintiffs' argument is that the derivative actions cannot be mass actions because, as derivative actions, they "do[] not assert individual claims (monetary or otherwise) of 100 persons – much less claims of 100 persons that are proposed to be tried jointly." Memorandum in Support of Remand in *Ferber* ("*Ferber* Memo.") at 5; Memorandum in Support of Remand in *Pierce* ("*Pierce* Memo.") at 6; Memorandum in Support of Remand in *Morning Mist* ("*Morning Mist* Memo.") at 6.

Derivative Plaintiffs cite no authority whatsoever holding that a derivative action on behalf of the limited partners of a partnership is not a "mass action" under CAFA, and we are

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6 This brief addresses the issue of whether the Actions are mass actions for purposes of CAFA. It does not address whether the class claims can be sustained given that the alleged injury to the class members is derivative to the injury to the companies. That issue will be addressed in FGA's motion to dismiss the Second Consolidated Amended Complaint.

7 As the Senate Judiciary Committee noted, mass actions "involve a lot of people who want their claims adjudicated together and they often result in the same abuses as class actions." S. Rep. No. 109-14, at 47 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 44.

aware of no such authority.[8] Instead, they identify cases that highlight the difference between direct and derivative claims. But these cases have nothing to say about the issue here. Whether a claim is direct or derivative is not the relevant question. The question is whether the complaint is brought in an effort to try the claims of 100 or more persons jointly. Here, the answer to that question is plainly yes.

Derivative Plaintiffs actually allege that defendants' conduct harmed the funds (Greenwich Sentry, Greenwich Sentry Partners, and Fairfield Sentry), *and their limited partners*, and consequently they seek to recover *for the benefit of those limited partners. See, e.g.*, *Ferber* Complaint ¶ 1 ("This action is brought in the name of and for the benefit of GS *and its Limited Partners*...") (emphasis added); *Pierce* Complaint ¶ 2 ("This action is brought in the name of and for the benefit of GSP *and its Limited Partners*..."); *Morning Mist* Complaint ¶ 1 ("This is a derivative action brought by Plaintiffs, who are shareholders of Fairfield Sentry."). Thus the Derivative Complaints on their face make clear that the Derivative Actions are brought for the benefit of investors in the funds. *See, e.g.*, *Beck v. Dobrowski*, 559 F.3d 680, 687 (7th Cir. Mar. 20, 2009) ("Because it is a derivative suit, a favorable judgment would accrue to all the shareholders...").

Importantly, the text of CAFA implicitly rejects the Derivative Plaintiffs' argument that derivative cases by their nature are excluded from coverage under the statute. Unlike the

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8 Moving Plaintiffs argue that in addition to remand, costs and attorneys fees should be awarded. District courts repeatedly have declined to award attorneys' fees in connection with a removal effected in good faith. *See, e.g.*, *Genton v. Vestin Realty Mortgage II, Inc.*, No. 06 Civ. 2517-BEN (WMC), 2007 WL 951838, at *3 (S.D. Cal. Mar. 9, 2007) (declining to grant award of attorneys' fees in connection with removal under CAFA and noting that "[v]ery little case law" exists regarding the exceptions to CAFA); *Carmona v. Bryant*, No. 06 Civ. 78-S (BLW), 2006 WL 1043987, at *3 (D. Idaho Apr. 19, 2006) (same); *Ind. State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Group, Inc.*, No. Civ. 3:05-0451, 2005 WL 2000658, at *2 (M.D. Tenn. Aug. 18, 2005) (same). Here, where neither side has found controlling authority, any fee award plainly is unwarranted.

Securities Litigation Uniform Standards Act ("SLUSA"), which explicitly precludes from removal "an exclusively derivative action brought by one or more shareholders on behalf of a corporation" 15 U.S.C. §§ 77p, 78bb, ***CAFA does not carve out derivative actions***. Explicit exclusion of derivative actions in SLUSA coupled with no such exclusion in CAFA, a statute covering similar subject matter and passed in a similar time period, clearly implies that Congress did not intend to exclude derivative claims from coverage under CAFA. *C.f. Sung v. Wasserstein*, 415 F. Supp. 2d 393, 408 (S.D.N.Y 2006) (Marrero, J.) (derivative action was not subject to removal under SLUSA specifically because, unlike CAFA, SLUSA explicitly precludes derivative claims from removal).

Derivative Plaintiffs also argue, with respect to *Pierce*, that the 100-person requirement is not satisfied because, they assert, "the Fund has just 29 current limited partners, and 5 former limited partners." *Pierce* Memo at p. 5. Plaintiffs are incorrect, as set forth in the Declaration of Paul J. Sirkis, dated July 27, 2009, ("Sirkis Declaration")[9] filed herewith. The Sirkis Declaration sets forth the results of the jurisdictional discovery ordered by the Court on the number and identity of the beneficial owners of Greenwich Sentry Partners ("GSP"), the partnership on behalf of which Plaintiffs in *Pierce* purport to bring their action. As set forth in the Sirkis Declaration, the number of beneficial owners of GSP's 29 current limited partners is at least 111, *i.e.*, 11 more than is needed to meet the statutory minimum of 100. If former limited partners are

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9 The Motion to Strike the Declaration of Michael Thorne, dated July 27, 2009 filed in connection with the removal of *Pierce* is now moot. *See, e.g., Willingham v. Morgan*, 395 U.S. 402, 407 n.3 (1969) ("[I]t is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits"); *see also Mora v. Harley-Davidson Credit Corp.*, No. 1:09 Civ. 01453 OWW GSA, 2009 WL 464465, at *4 (E.D. Cal. Feb. 24, 2009) (same); *Ava Acupuncture P.C. v. State Farm Mut. Auto. Ins. Co.*, 592 F. Supp. 2d 522, 529 n.49 (S.D.N.Y. 2008) (relying on revised affidavit filed with defendant's remand opposition papers after plaintiffs alleged that affidavit filed with notice of removal was deficient).

included, who presumably are among the underlying claimants in the case, the total number of beneficial owners of GSP is even greater – at least 169.

(b) The Sentry Action Also Is A Mass Action

Similar to the Derivative Plaintiffs' argument, the Fund argues that its Complaint has "only one plaintiff" and that "to find that the 100-person requirement is met merely because a private or public corporation has more than 100 shareholders would ignore well-settled corporate law that the corporation is a distinct legal entity separate from its shareholders." Memorandum in Support of Remand in *Sentry* at 6 ("*Sentry* Memo"). This argument misses the point. The issue here is not whether the corporate veil should be pierced, but only whether under the language and intent of CAFA the action qualifies as a mass action in that it is brought to obtain a recovery for 100 or more persons. That clearly is the case here. Sentry is a defunct fund consisting of a collection of over 700 investor accounts. Declaration of Michael Thorne, June 19, 2009, ¶2 (filed with FGA's Notice of Removal in *Sentry*). The claims brought by Sentry here are for losses suffered by those investors holding those accounts, just as the class claims seek to recover the same losses suffered by those same investors (*i.e.*, the Shareholder Class Plaintiffs). Accordingly, the class claims and the *Sentry* claims should be treated the same for jurisdictional purposes under CAFA. Indeed, the explicit intent of CAFA is to disallow plaintiffs to avoid federal jurisdiction where recovery for a group of 100 or more injured plaintiffs is sought, regardless of whether plaintiffs proceed as a class action or in some other form. *Sentry* falls squarely within the kind of case that qualifies as a mass action eligible for removal to federal court under CAFA. *See, e.g., La. ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 428, 430 (5th Cir. 2008) (holding that a *parens patriae* antitrust action by the Attorney General for the benefit of individual insurance policyholders, in which the AG was "only a nominal party" and the individual insurance policyholders were the "real parties in interest," was removable under CAFA because the action "is being brought in a representative capacity on behalf of those who allegedly suffered harm.")

Significantly, the Fund has not cited any authority holding that the "mass action" provisions of CAFA do not apply to an action brought by an investment fund for the benefit of its one hundred or more shareholders, and we are aware of none.[10]

2. Moving Plaintiffs Have Not And Cannot Establish A CAFA Exception

Moving Plaintiffs, as the parties seeking remand, bear the burden to establish that one of CAFA's express exceptions applies.[11] *Brook v. UnitedHealth Group Inc.*, No. 06 CV 12954 (GBD), 2007 WL 2827808, at *3 (S.D.N.Y. Sept. 27, 2007) ("[W]here a statutory basis for exercising federal jurisdiction has been shown, the party opposing the exercise of the Court's established jurisdiction bears the burden of demonstrating that a CAFA exception exists."); *New Jersey Carpenters Vacation Fund*, 581 F. Supp. 2d at 588 ("Because . . . Defendants have shown that the case meets CAFA's removal requirements, the burden shifts to the Plaintiffs to show whether a CAFA exception applies."); *Puglisi*, 2009 WL 1515071, at *1 (holding that where the initial requirements for CAFA removal are met, the burden is on plaintiff to establish that one of the exceptions to CAFA is applicable).[12]

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[10] The Fund erroneously cites *Palm Harbor Homes, Inc. v. Walters*, No. 08 cv 196, 2009 WL 562854, *2 (M.D. Ala. Mar. 5 2009), for the proposition that an action "filed by a single corporate plaintiff" cannot be removed under CAFA. *Sentry* Memo at 6. Unlike here, plaintiffs in *Palm Harbor* did not assert that the action was a "mass action." Instead, they claimed that the lawsuit (a declaratory judgment) was removable under CAFA because it was "related to an arbitration between the parties wherein class allegations have been made." *Palm Harbor Homes, Inc.*, 2009 WL 562854, at *2. Equally inapposite is *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009). There, the court held that the mass action provisions of CAFA did not apply to a series of actions (each of which asserted claims of fewer than 100 plaintiffs) because those actions were "joined upon motion of a defendant," and 28 U.S.C. § 1332(d)(11)(B)(ii)(II) precluded such claims from removal as a mass action. That provision does not come into play here.

[11] Moreover, as a court in this district has noted, any such exceptions must be narrowly construed. *See New Jersey Carpenters Vacation Fund*, 581 F. Supp. 2d at 584-85 ("Congressional sponsors of [CAFA] repeatedly emphasized the breadth of CAFA, while insisting that each exception must be construed narrowly[.]").

Moving Plaintiffs argue that two exceptions apply: (1) the $75,000 jurisdictional amount exception; and (2) the internal affairs exception. Moving Plaintiffs fail to meet their burden on both exceptions.

(a) The "Amount In Controversy" Requirement And Other Jurisdictional Amount Requirements Under CAFA Are Met

Plaintiffs do not dispute, and by their silence, concede, that the "amount in controversy" requirement of $5 million in the aggregate – a threshold CAFA requirement (*see* 28 U.S.C. § 1332(d)(2),(6)) – is met. Instead, Derivative Plaintiffs erroneously contend that because *Pierce*, *Ferber*, and *Morning Mist* are derivative actions, "no plaintiff – much less 100 persons – could satisfy the $75,000 jurisdictional amount required under 28 U.S.C. § 1332(a)." *Pierce* Memo at 7; *Ferber* Memo at 6; *Morning Mist* Memo at 7.

First, Derivative Plaintiffs' statement is speculation, not fact, and deserves no weight at all. Second, the $75,000 threshold is irrelevant for federal jurisdiction purposes because CAFA expressly expands the district court's removal jurisdiction to include actions where the aggregate amount in controversy exceeds $5 million (*see* 28 U.S.C. § 1332(d)(2),(6)). FGA has established to a "reasonable probability" that each Action involves an aggregate amount in controversy greater than $5 million and claims of more than 100 plaintiffs are proposed to be tried together and therefore the Actions may be removed as mass actions. The claims of any individual plaintiffs with potential damages of less than $75,000 could, if the Court so determines, then be subject to remand for want of subject matter jurisdiction. This is consistent with the legislative intent of CAFA, as the Committee Report indicates:

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[12] Moving Plaintiffs argue that the Second Circuit has not yet ruled on the issue. However, district courts in the Southern District of New York have unanimously and persuasively concluded that the burden to prove that an exception to CAFA applies rests with the plaintiff. As the court in *Brook* explained, "[i]t is a well established rule that the party seeking remand bears the burden of proving the applicability of an exception with regard to the general removal statute. . . . Since the structure of CAFA is comparable to the general removal statute, it should be interpreted consistently therewith. . . . Moreover, shifting the burden of proving an exception to the party seeking remand once the opposing party has established his right to a federal forum is consistent with CAFA's legislative intent to ensure that class actions of interstate or national implications be litigated in federal courts." *Brook*, 2007 WL 2827808, at *3. This view is in accord with decisions of the Fifth, Seventh, Ninth, and Eleventh Circuits. *See Preston v. Tenet Healthsystem Mem'l Med. Ctr.*, 485 F.3d 804, 813 (5th Cir. 2007); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 680 (7th Cir. 2006); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006); *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006). *See also Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003).

> Subsequent remands of individual claims not meeting the Section 1332 jurisdictional amount requirement may take the action below the 100-plaintiff jurisdictional threshold or the $5 million aggregated jurisdictional amount requirement.... [But,] so long as the mass action met the various jurisdictional requirements at the time of removal, it is the Committee's view that those subsequent remands should not extinguish federal diversity jurisdiction over the action.

S. Rep. 109-14, at 47 (2005), *as reprinted in* 2005 U.S.C.C.A.N at 44.

Indeed, courts interpreting 28 U.S.C. § 1332(d)(11)(B)(i) have noted that jurisdiction over an entire action exists if *at least one* plaintiff meets the $75,000 jurisdictional amount required under 28 U.S.C. § 1332(a). *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2008) ("[I]t seems clear that the $75,000 provision was not intended to bar district courts from asserting jurisdiction over the entire case if each individual plaintiff's claims do not exceed $75,000."); *Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006) ("[The Committee Report's] clarification [regarding the $75,000 requirement] is consistent with a logical reading of the statue."). It is both wrong and disingenuous for Derivative Plaintiffs to argue that simply because their claims are styled as derivative actions, *no plaintiff* could meet the $75,000 jurisdictional amount required under 28 U.S.C. § 1332(a).

It is also misleading for the *Ferber* Plaintiff to argue that "the Complaint does not describe [the over $9.5 million in fees paid] as damages suffered by plaintiffs." *Ferber* Memo at 6. In fact, the *Ferber* Complaint seeks, in addition to costs and other relief:

- "restitution of the monies paid to the Fund Defendants based on artificially inflated capital accounts of the Limited Partners";
- "ordering that PwC Canada and PwC Netherlands return any fees which it was paid by the Fund for alleged auditing services";
- "the imposition of a constructive trust over the monies received by FGG Bermuda, FGG Limited and/or each of the other Fund Defendants as Management Fees and/or Incentive Allocations calculated based on the artificially inflated capital accounts of the Limited Partners"; and
- "compensatory damages...individually and severally in an amount to be determined at trial".

Moreover, the requested relief is sought "in Plaintiff's favor." Based on the amounts listed on the face of the complaints – \$9.5 million in fees paid and \$9 million in allegedly mismanaged funds – and the fact that the *Ferber* Plaintiff seeks the return of all fees as well as "compensatory damages" as the result of defendants' alleged mismanagement of the funds, a "reasonable probability" that all jurisdictional requirements are met unquestionably has been established. And in any event, plaintiffs have not even attempted to meet their factual burden of showing that every injured party's claim is less than \$75,000.

(b) The Internal Affairs Exception Does Not Apply

Moving Plaintiffs also argue that remand is appropriate here because the "internal affairs exception" applies. *Pierce* Memo at 8-9; *Ferber* Memo at 7-8; *Morning Mist* Memo at 7-8; *Sentry* Memo at 8. Moving Plaintiffs fail to establish that this exception applies.

Under the internal affairs doctrine, a federal court shall not have jurisdiction over any class or mass action that "solely involves a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized..." 28 U.S.C. § 1332(d)(2). The Senate Judiciary Committee Report on CAFA indicates that the internal affairs exception is directed at this doctrine, which involves "matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders." S. Rep. No. 109-14, at 45, *as reprinted in* 2005 U.S.C.C.A.N. 3, 43 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). The doctrine essentially "is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs... because otherwise a corporation could be faced with conflicting demands." *Id.* at 645.

The internal affairs exception does not apply to any of the Actions because each of the Complaints include allegations of improper marketing and promotion of the Fairfield Greenwich funds that concern how the company represented itself to the public. As such, they do not solely concern the internal affairs or corporate governance of the funds. *Puglisi,* 2009 WL 1515071, at *3 (After reviewing the allegations contained in plaintiff's complaint, the court concluded that plaintiff had not met this burden based, in part, on the claim that defendants had "assured investors of the minimal risk to their investment . . . [in] marketing materials...").

The exclusion of these Actions from the CAFA internal affairs exception also is mandated by the Congressional intent of that exception. Congress enacted the CAFA internal affairs exception in order "to avoid disturbing in any way the federal versus state court jurisdictional lines already drawn in the securities litigation class action context by the enactment of [SLUSA]." *In re Textainer P'ship Sec. Litig.*, 2005 WL 1791559, at *4 (quoting S. Rep. No. 109-14, at 45 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 43). The jurisdictional lines drawn by SLUSA include the so-called "Delaware carve-out," which provides that states retain jurisdiction over covered class actions "based upon the statutory or common law of the State in which the issuer is incorporated." 15 U.S.C. § 77p(d). The purpose of the Delaware carve-out was to preserve the expertise and efficiency of Delaware courts over mergers, acquisitions, and other extraordinary transactions. *See, e.g.*, Cong. Record (extension of remarks), July 22, 1998, p. E1391 (comments of Rep. Anna G. Eshoo); Jennifer O'Hare, Director Communications and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-Fraud Provisions of the Federal Securities Laws, 70 U. CINN. L. REV. 475, 501-04 (2002). CAFA's internal affairs exception rests on a similar premise: that state courts' expertise over matters of a corporation's internal affairs or governance that arise under or by virtue of the laws of the state of incorporation or organization should be preserved. That premise, however, is irrelevant here, where New York state law issues do not arise and no state court expertise is applicable.

With respect to Derivative Plaintiffs' claims in particular, the internal affairs exception also does not apply because the complaints heavily implicate the conduct of external third parties. "Different conflicts principles apply, [...], where the rights of third parties external to the corporation are at issue." *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 621 (1983). A substantial portion of Derivative Plaintiffs' Complaints – in each case over 12 pages – concerns the role of PricewaterhouseCoopers ("PwC") as auditor to the fund. *Ferber* Compl. at 35-49; *Pierce* Compl. at 35-49; *Morning Mist* Compl. at 49-69. PwC's role clearly falls outside the "internal affairs doctrine" because PwC is not a limited partner, general partner, manager, or investment manager in any fund. As an outside party, PwC's role with respect to any of the funds is by definition outside those funds' internal affairs. *See, e.g., In re Am. Int'l Group, Inc.*, 965 A.2d 763 (Del. Ch. 2009). Moreover, Derivative Plaintiffs' breach of contract claims against PwC (*Pierce* Compl. at ¶¶ 189-195; *Ferber* Compl. at ¶¶ 189-195; *Morning Mist* Compl. at ¶¶ 292-300) do not "arise under or by virtue of the laws of the State in which [the Fund] is organized." 28 U.S.C. § 1332(d)(2).

Derivative Plaintiffs' reliance on *In re Textainer P'ship Sec. Litig.*, 2005 WL 1791559 is misplaced. In *Textainer*, in contrast to the Actions here, plaintiff limited partners sued derivatively *only* the partnerships and their general partners for breach of fiduciary duties. The court held that the internal affairs exception applied because, *inter alia*, no claims were made against any third parties, such as the partnerships' auditors. *Id.*

.With respect to *Sentry*, the Fund argues that its complaint should be remanded to State court because "the Company's claims implicate its internal affairs and the duties that the Fairfield Defendants owed to the Company." *Sentry* Memo at 8. However, the internal affairs exception only applies to a claim "that arises under or by virtue of the laws of *the State in which such corporation or business enterprise is incorporated or organized…*" (emphasis added) 28 U.S.C. § 1332(d)(9)(b). The Fund is not incorporated or organized under any U.S. State. Instead, as the Fund acknowledges, it is "a company duly incorporated on October 30, 1990 under the International Business Companies Act of the British Virgin Islands, automatically re-registered on January 1, 2007 as a business company under the BVI Business Companies Act of 2004 of the British Virgin Islands, and recognized as a professional fund under the 1996 Mutual Funds Act of the British Virgin Islands." *Sentry* Complaint ¶ 12. Moreover, the Fund's "principal place of business is in the British Virgin Islands." *Id.* Thus, for this reason as well, the internal affairs exception cannot apply to the *Sentry* Complaint.

CONCLUSION

For the foregoing reasons, Moving Plaintiffs' request to remand *Ferber*, *Pierce*, *Morning Mist*, and *Sentry* to State court should be denied.

Dated: July 27, 2009
New York, New York

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EXHIBIT A

Case	Date Complaint Removed	Date Consolidated with *Anwar*	Date Motion to Remand Filed
Ferber v. Fairfield Greenwich Group et al. (filed February 13, 2009)	March 13, 2009, as amended on March 19, 2009	March 24, 2009	April 14, 2009
Pierce et al. v. Fairfield Greenwich Group et al. (filed February 17, 2009)	March 19, 2009	March 31, 2009	April 8, 2009
Morning Mist Holdings Limited et al. v. Fairfield Greenwich Group et al. (filed May 15, 2009)	May 29, 2009	June 9, 2009	June 8, 2009
Fairfield Sentry Limited v. Fairfield Greenwich Group et al. (filed May 29, 2009)	June 19, 2009	June 25, 2009	July 10, 2009

EXHIBIT B

The eleven consolidated cases are:

1. *Anwar, et al. v. Fairfield Greenwich Group, et al.* (09 CV 0118) ("*Anwar*")
2. *Zohar, et al. v. Fairfield Greenwich Group, et al.* (09 CV 4031)
3. *Laor, et al. v. Fairfield Greenwich Group, et al.* (09 CV 2222)
4. *The Knight Services Holdings Limited, et al. v. Fairfield Sentry Limited et al.* (09 CV 2269)
5. *Inter-American Trust, et al. v. Fairfield Greenwich Group, et al.* (09 CV 0301)
6. *Pacific West Health Medical Center Inc. Employees Retirement Trust, et al. v. Fairfield Greenwich Group, et al.* (09 CV 0134)
7. *Fairfield Sentry Limited vs. Fairfield Greenwich Group, et al.* (09 CV 5650) ("*Sentry*")
8. *Ferber v. Fairfield Greenwich Group, et. al.* (09 CV 2366)
9. *Pierce, et al. v. Fairfield Greenwich Group et al.* (09 CV 2588)
10. *Morning Mist Holdings Limited, et al. v. Fairfield Greenwich Group, et al.* (09 CV 5012)
11. *Bhatia, et al. v. Standard Chartered International (USA) Ltd., et al.* (09 CV 2410)